No. 15,178

IN THE

United States Court of Appeals

For the Ninth Circuit

ONG WAY JONG, alias Johnny Ong, and WEE ZEE YEP,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
San Francisco 1, California,
Attorneys for Appellee.

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JURISDICTION.

Jurisdiction is invoked under Title 18 United States Code, Section 3231, Title 28 United States Code, Sections 1291 and 1294, and the Sixth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

Appellant and his co-defendant Wee Zee Yep were indicted on March 7, 1956 in three counts for violation of the narcotic laws of the United States (Tr. 3-6). The first count charged the defendant Yep individually with selling 1 ounce, 36 grains of heroin. The second count charged the defendant Yep with concealing and

facilitating the concealment of the same amount of heroin. The third count charged both the defendants with conspiring to sell, conceal and transport narcotic drugs. On March 15, 1956 the appellant Ong Way Jong plead not guilty (Tr. 8). Defendant Yep pleaded guilty to count two, but not guilty as to counts one and three, on March 19, 1956 (Tr. 9). On April 20, 1956 both defendants waived trial by jury (Tr. 6-7) and on April 25, 1956 both defendants were tried by the court, United States District Judge Michael J. Roche presiding (Tr. 23). After evidence was introduced on behalf of the government, appellant Ong Way Jong testified in his own behalf (Tr. 175). Defendant Yep elected not to take the stand. Judge Roche, after hearing argument by counsel for the government and defense, found both defendants guilty of all counts (Tr. 213). In connection with the court's findings, Judge Roche made the following remarks:

> "The Court: There is much to be said in your relation to this case, but I am in doubt about it being helpful in any way. But on the theory of the defense here I would have to disbelieve all the testimony of the witnesses for the Government. On the other hand, in appraising the witnesses here, and particularly the defendants themselves, I can [sic] understand how from their testimony I couldn't [sic] possibly give it the credence that I could the other witnesses, and for that reason I find both of the defendants guilty as charged in the indictment in counts 1, 2 and 3."

Thereafter, after a motion for a new trial was denied, (Tr. 10) the court sentenced appellant to a term of five years and fined him the sum of $1.00 (Tr. 10).

Appeal was then timely made to this court (Tr. 18). Defendant Yep also appealed. However, this court dismissed the appeal for lack of prosecution on September 19, 1956 (Tr. 21). Appellant Ong Way Jong, therefore, is the only defendant before the court.

Defendant Ong had been previously convicted of possession of narcotics in Los Angeles in 1951 (Tr. 190). He had been unemployed for a year prior to the narcotic transaction of February 1, 1956 (Tr. 92-148). Shortly after the narcotic transaction Ong purchased a new 1955 Cadillac, making a cash payment of $1600 (Tr. 127-129). During the transaction itself Mr. Jong utilized his 1951 Cadillac (Tr. 115, 104, 1943). The only explanation Ong could give for his expensive automobiles, expensive clothes and home was that his source of income was from gambling (Tr. 92-148).

Appellant's co-defendant Yep has sold Agent Wu two ounces of heroin which he had obtained from another connection on January 23, 1956 (Tr. 42-43). During the progress of this sale Yep disclosed that he had several sources for narcotics (Tr. 39-40). Yep explained that the connection for the January 23 sale was a white seaman (Tr. 39-40). When asked by Agent Wu to telephone his local connection Yep replied that he could not do so because his connection did not have a telephone (Tr. 54). It is interesting to note that at the time of appellant's arrest it was discovered that appellant had no telephone (Tr. 148).

On February 1st a second purchase of narcotics from defendant Yep was discussed at agent Wu's apartment

at about two o'clock in the afternoon (Tr. 45). Yep stated that he would leave the apartment and go directly to his "friend" and return with the narcotics (Tr. 45). When Yep left the apartment he was followed by Narcotic Agents Stenhouse, Prziborowski, and Hipkins directly to the residence of defendant Jong, 83 Winfield Street, San Francisco (Tr. 111, 101, 102, 80). Shortly thereafter the defendant Yep left appellant's apartment and drove to Mason and Jackson Streets (Tr. 80). The agents further testified that at approximately 3:55 P.M. appellant drove his 1951 Cadillac to this intersection (Tr. 112, 102, 81, 82). Yep left his car and entered that of appellant's (Tr. 80). The two defendants were observed conversing for a short period of time (Tr. 112). Then the defendant Yep left the Cadillac and entered his Mercury vehicle, and drove to Agent Wu's apartment at 225 Chestnut Street (Tr. 112).

At the apartment Yep informed Wu that his original offer for narcotics was low, and that he could not get it for Wu for less than $600.00 per ounce (Tr. 46). A meeting was arranged for eight o'clock at Compton's Restaurant (Tr. 47). At about 7:30 Yep and Ong were observed to meet in appellant Jong's 1951 Cadillac on John Street (102-103, 83). After a few moment's conversation the defendant Yep left defendant Ong and was followed by Agents Stenhouse and Wolski to Compton's Restaurant on Van Ness Avenue, where he met Agent Wu (Tr. 114-142) at 8:15. Yep told Wu that he was still negotiating for delivery, that he was sure he could make it later that evening (Tr. 47).

Following this conversation Yep was followed by Narcotic Agents to Jackson and Mason Streets, where he met appellant Ong (Tr. 114, 115, 103, 142, 143). After a few moments conversation appellant left this location, and was gone for approximately 1 hour (Tr. 104, 143). The defendant Yep remained in view of the agents at all times (Tr. 104, 105, 84, 85, 143). At approximately 9:30 P.M. he was observed entering a drugstore by Agent Wolski (Tr. 143). Agent Wu testified that he received a telephone call from Yep at approximately 9:30 P.M. In this telephone call Yep told Wu that the narcotic delivery would be made within the hour, and that Yep was then waiting for his "connection" to return with the heroin (Tr. 47-48).

At approximately 10 o'clock narcotic agents observed appellant Ong returning to the vicinity of Jackson and Mason Streets in his Cadillac (Tr. 115, 104, 105, 85, 143, 144). During the period from the telephone call to Wu and the arrival of Ong, Yep apparently paced back and forth from the intersection at Jackson and Mason Streets (Tr. 115). At Ong's arrival, Yep joined him in the entrance way of 1003 Jackson Street (Tr. 115, 105, 85, 143, 144). The agents observed appellant with a small child in his arms at the time of his meeting with Yep (Tr. 115, 105, 85, 143, 144). After a meeting from thirty seconds to a minute Yep left Ong (Tr. 115, 116, 105, 85, 144). The agents then saw Yep go directly to Agent Wu's apartment at 225 Chestnut Street (Tr. 116). There, Agent Wu testified, he delivered the

heroin in return for $600.00 of government advance funds (Tr. 48, 49). Following receipt of the money the defendant Yep was followed by agents back to Jackson and Mason Streets, where he met appellant Ong (Tr. 105, 85, 86). Surveillance was then discontinued (Tr. 86).

On February 7, 8, 13 and 17 negotiations were conducted for another sale of heroin (Tr. 53, 54). On February 7th Yep called Agent Wu and told him he had placed an order for him (Tr. 51). Yep informed Wu that the connection was at that time playing Mah Jong, and that he, Yep, would join him to confirm Wu's order (Tr. 51, 52). At 9:15 that evening Agent Hipkins saw Yep and appellant Ong leaving a Mah Jong game room at 31 Spofford Alley in Chinatown (Tr. 88). On the 8th of February at about noon Yep told Wu that he was with his "connection" and was attempting to obtain the narcotics that Wu had ordered (Tr. 53). On February 8th, Agent Stenhouse observed Yep go to Johnny Ong's residence at 83 Winfield Street (Tr. 121). He then saw the two defendants enter appellant's new 1955 Cadillac and drive off (Tr. 122). Both defendants were still together at approximately 3:15 that afternoon (Tr. 122). Later that evening Yep called Wu and indicated that he could not make delivery at that time (Tr. 53).

On February 13th Yep and Wu again had conversation in which the agent complained about the long delay (Tr. 53). Wu questioned the reliability of Yep's connection. Yep said he would try again to see that "man" and obtain narcotics for Wu (Tr. 54).

Later that evening Yep telephoned Agent Wu (Tr. 55). Wu overheard a conversation with someone called Johnny, and then Yep informed Wu he could not deliver that night (Tr. 56).

On the 17th day of February Yep informed Wu that he required payment in advance (Tr. 56). Wu demurred to this arrangement (Tr. 56). Yep offered to secure his "connection's" 1955 Cadillac as collateral (Tr. 56). Wu said, however, that he must have the narcotics before he paid his money (Tr. 56). On the 19th, after further questioning by Wu as to the reliability of his connection, Yep stated that he was expecting a shipment by ship, and on the 21st Yep supplied a pound of narcotics which he obtained from a connection other than Johnny Ong (Tr. 60).

Appellant Ong was questioned and arrested on February 21, 1956 (Tr. 88, 146). At that time he was questioned concerning his association with Yep (Tr. 91). Ong made no reply to any of the questions or accusations of Agent Hipkins (Tr. 22). When questioned as to his source of income in connection with his home, Cadillacs and expensive clothes, the defendant stated only that he gambled (Tr. 92, 148). He admitted that he had been unemployed for a year (Tr. 92, 148). He would not answer any questions concerning his activities on the night of February 1 (Tr. 147).

On direct examination Ong testified that he did not answer the agent's questions because he did not want his friend Yep to become involved (Tr. 178). On cross-examination, however, testified that he had

remained silent in order to protect himself (Tr. 189). On the timing of his version of events of February 1st, he said that about 6:30 o'clock he had taken his 18-month-old son to a barber in order to get him a haircut (Tr. 181). The barber wasn't there (Tr. 182). He then left the barber shop for a period of time, and returned at 7:00 o'clock (Tr. 182). He then left the barber shop once again and met Rocky Yep (Tr. 182). Thereafter he went again to the barber shop and found his barber busy (Tr. 184). He left the barber shop again and went to Lucy's place (Tr. 184) and watched TV (Tr. 184). Then he went back to the barber shop again with his little boy Kelvin (Tr. 185). At about ten o'clock, apparently, he finally got the 18-month-old child a haircut (Tr. 185), and he left the barber shop again.

He then went to play Mah Jong (Tr. 186). At that time he met Yep again. It was his testimony that he entered the Fong residence with Yep, where they both played Mah Jong (186). His 18-month-old baby was still with him (Tr. 195). About 11 o'clock, with the child apparently still at the Mah Jong game, Johnny Ong met Yep. After this meeting it apparently occurred to Ong, according to his testimony, that it was late, and he thought of taking the child to dinner (Tr. 186). He denied supplying Yep with narcotics (186).

Judge Roche did not believe his story, and found both him and Yep guilty on all counts (Tr. 213).

QUESTIONS PRESENTED.

1. Was evidence improperly admitted?

2. Is the evidence sufficient?

3. Was appellant illegally entrapped?

4. Was appellant's conversation at the time of his arrest admissable?

ARGUMENT.

I.

NO ERROR WAS COMMITTED IN THE RECEPTION OF EVIDENCE.

Appellant in point 4 of his argument (at page 55) argues that declarations of appellant's co-defendant Yep should not have been admitted.

Appellant nowhere indentifies the particular testimony to which his objection is directed. Without this identification it is impossible to determine what, if any, part of Yep's testimony appellant objects. The government does not propose to examine and argue each bit of the Yep testimony with a view to demonstrating its admissibility.

It must be remembered that the defendant Wee Zee Yep was tried with appellant. Necessarily evidence was admitted against him which would not be admissable against appellant. Certain evidence admitted during the course of the trial shed light upon the defendant Yep's intent. Appellant, however, has not advised the court as to whether he objects to the ad-

mission of this evidence or to other evidence which was admitted and was admissible, in the government's view, in proof of the conspiracy charge of the indictment.

The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. A common design is the essence of the charge, and such design may be made to appear when the defendants and co-conspirators steadily pursue the same object whether acting separately or together by common or different means, all leading to the same unlawful result. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object the trier of the fact is justified in the conclusion that such persons were engaged in a conspiracy.

Chadwick v. United States, 141 Fed. 225, 251;
Allen v. United States, (9th Cir.) 4 F. 2d 688, 691;
Coates v. U.S., 59 F. 2d 173, 174.

In a conspiracy charge, if the government shows that the defendant acted in concert in pursuance of a common design, the crime of a conspiracy is made out.

American Tobacco Company v. United States, 328 U.S. 781;
Marino v. United States, (9th Cir.) 91 F. 2d 691.

Since a conspiracy requires two persons or more it follows that acts done by others in pursuance of its

object must be admissible against a defendant in order that his connection with the conspiracy may be shown. Any declarations, therefore, by co-conspirators, which tend to show a concert of action between them is admissible against them, even though all the conspirators are not present at the time of the declaration. In order to show a concert of action the acts and declarations of Yep must be considered in conjunction with the acts and declarations of appellant.

In point 4 of his argument appellant has made some general statements from various cases concerning the law of conspiracy. He has not made any argument, however, demonstrating that the proof in the instance case was in any particular inadmissible against him.

In this case, on February 1st, a sale of narcotics was completely consummated. Agents of the Bureau of Narcotics traced defendant Yep from his agreement to sell to Agent Wu until he delivered the heroin back to Agent Wu's apartment at 225 Chestnut Street (Tr. 48-49). The proof showed that Yep contacted no one except appellant during the time he secured the narcotics for Agent Wu. Following the receipt of the $600 of government money he returned immediately to appellant Johnny Ong (Tr. 105, 85, 86).

To be sure, if the evidence admitted showing that Yep had contracted with Agent Wu for a sale to Wu of heroin had not been admitted, the proof against appellant would have fallen because evidence of appellant's acts became meaningful only in conjunction

with the acts of his co-conspirator. It is not necessary, however, to constitute a conspiracy, to violate the narcotic laws, that all conspirators deliver the narcotics, or that all conspirators contract for the narcotic sale. The proof in this case clearly showed that appellant was the source, the "connection" from which the peddler Yep secured narcotics.

In a conspiracy case, as has been stated above, evidence of the acts and declarations of co-conspirators are necessarily admissable against a defendant for the light they throw on the defendant's conduct. If his conduct, in conjunction with theirs, shows the necessary concert of action, the conspiracy charge is made out. Just as it takes the evidence of the two parties to prove a contract, it takes evidence of at least two co-conspirators to prove a conspiracy.

As stated above, the government is in some doubt as to what particular testimony appellant objects. It should be remembered, however, that this case was tried by the court instead of by jury. A court is presumed to have considered only that evidence which is properly admissible against each defendant.

Clauson v. U.S. (8th Cir.) 60 F.2d 694, 1932;
Anderson v. U.S. (8th Cir.) 65 F.2d 870, 1933.

The same safeguards which are necessary in a jury trial are not necessary in a trial before a United States District Judge. A jury composed of laymen might be misled by extraneous factors, which a court with long experience in the trial of criminal actions would disregard.

The order of proof in a conspiracy case is within the discretion of the court.

Newman v. U.S. (9th Cir.) 156 F.2d 8.

If appellants' point is that at some time during the trial appellants' connection with the conspiracy was not shown, then the simple answer to appellants' objection is that once the declarations of Yep were shown to be connected with the actions of appellant Ong, all evidence was properly admitted against appellant.

II.

THE EVIDENCE WAS SUFFICIENT.

In this case appellant's co-defendant Yep had had various negotiations with Narcotic Agent Wu leading toward the purchase of narcotics (Tr. 42-43). On January 23, Yep had sold two ounces of heroin to Wu from another "connection" (Tr. 42, 43). At the time of the sale, however, Yep made it clear that he had more than one source for narcotics (Tr. 39-40). On February 1 a sale with this other source was discussed with Agent Wu (Tr. 45). Yep made it plain that he could not telephone this connection (Tr. 54). Appellant had no telephone (Tr. 148). Yep, therefore, said he would go directly to his "friend" to secure the narcotics for Wu (Tr. 45). Yep then went directly to the residence of appellant (Tr. 111, 101, 102, 80). Thereafter there was another meeting between the two co-conspirators (Tr. 112). Then Yep left appellant Johnny Ong and went back to Agent

Wu's apartment (Tr. 112). At the apartment Yep informed Wu that his original offer was too low (Tr. 46). At no time was Yep observed to contact anyone else besides appellant. The only time he was out of the observation of the narcotic agents was when he was within Johnny Ong's home. The only place that Yep could have secured the information that Wu's offer was too low was from Johnny Ong.

Later that evening appellant and Ong were observed to meet again in appellant's 1951 Cadillac (Tr. 102, 103, 83). After a conversation Yep went to a prearranged meeting place where he met Wu at Compton's Restaurant (Tr. 114, 142). At that time Yep told Wu he was still negotiating for delivery for the $600 price agreed upon. Then Yep met Ong again (Tr. 114, 115, 103, 142, 143). After this meeting Yep called Wu and told him that the narcotics delivery would be made within the hour, and that he, Yep, was waiting for his "connection" to return with the heroin (Tr. 47, 48). Approximately an hour later Ong returned to Jackson and Mason Streets (Tr. 115, 104, 105, 85, 143, 144). During the period from the telephone call until appellant's return Yep paced back and forth from the intersection at Jackson and Mason Streets, obviously waiting impatiently for Ong's return (Tr. 115). At Ong's arrival Yep joined him in the entrance of 1003 Jackson Street (Tr. 115, 105, 85, 143, 144). At the time the agents observed Ong with a small child in his arms (Tr. 115, 105, 85, 143, 144). It is interesting to note that the narcotic package was stained with what appeared to the agent to be diaper

stains (Tr. 91). After a meeting of from 30 seconds to a minute Yep left Ong and drove directly to Wu's apartment at 225 Chestnut Street, and delivered the heroin in return for $600 (Tr. 116, 48, 49).

Once again Yep had contacted no one, except appellant Ong. The only source from which he could have obtained the heroin was Ong, just as before the only source from which he could have obtained the information that Wu's offer was too low was from appellant Johnny Ong. Furthermore, after he secured the $600 he went immediately back to appellant Ong, obviously splitting the spoils (Tr. 105, 85, 86).

Shortly after the transaction appellant Ong, who had been unemployed for more than a year, purchased a new 1955 Cadillac (Tr. 127, 129). The only explanation appellant could offer for his expensive cars, clothes and home was that he gambled (Tr. 92, 148). Appellant's testimony at the trial was contradictory, and Judge Roche felt inherently improbable (Tr. 213). His explanation for his meetings with Yep was that he was taking his one and one-half year-old-child for a haircut (Tr. 182). It appeared that he had visited a barber shop around 7 or 8 times from about 7 o'clock until after 10 o'clock before he secured the haircut (Tr. 181 through 185). It was not until about 11 o'clock that it occurred to him that the child might be hungry (Tr. 186). He was contradicted by the agents concerning the length of his contact with Yep. Ong testified that he entered the Fong residence with Yep, where they both played Mah Jong (Tr. 186). He testified that Yep stayed within the house 5 to 10 minutes. The

agents, however, testified it to be but a brief meeting of 30 seconds to one minute (Tr. 115, 116, 105, 85, 144).

This court is not concerned with the weight of evidence. It does not constitute itself, as a trial jury, to retry the case. On appeal Appellate Courts adopt the inferences most favorable to the government's case.

Barcott v. United States (9th Cir.) 169 F.2d 921, 931, cert. denied;

Henderson v. United States (9th Cir.) 143 F.2d 681;

Gendelman v. U.S. (9th Cir.) 191 F.2d 993;

Glasser v. United States, 315 U.S. 60.

Evidence of appellant's guilt is clear. The evidence is more than sufficient. The evidence, although circumstantial, proves defendant's guilt beyond a reasonable doubt.

III.

THERE IS NO ENTRAPMENT.

The defense of entrapment is a defense of confession and avoidance. The defendant, although he admits committing the crime, argues that public policy prohibits his conviction because of the actions of the government agents. Here appellant denies his guilt.

As this court has said it logically follows that absent the commission of a crime and there can be no entrapment.

Eastman v. United States (9th Cir.) 212 F.2d 320, 322;

Bakotich v. United States (9th Cir.) 4 F.2d 386.

Furthermore, in this case the defense of entrapment was never even raised at the trial. Appellant is asking this court to constitute itself a trier of the fact and to examine the record with a view to deciding whether there was, in fact, entrapment in the instant case.

Appellant does not point to any testimony which would indicate that government agents sought to entice improperly appellant. He apparently is raising the issue of entrapment only with respect to his co-defendant Yep, who has not appealed and is not before the court. The testimony on which he relies, even as to Yep is not presented to the court. There is no case to our knowledge which has never held that a defendant may take advantage of another's entrapment to avoid the consequences of his own criminal acts.

In this case, even if there is such a thing as entrapment as a matter of law, which we doubt, the facts do not indicate in the slightest degree that the intent to commit a narcotic conspiracy originated in the mind of Agent Wu rather than the defendant Yep and appellant Ong.

See *Trict v. United States*, (9th Cir.) 211 F.2d 513, 1954;

Henry v. United States, 215 F.2d 639, 1954.

IV.

APPELLANT'S CONVERSATIONS WITH THE NARCOTIC AGENTS AT THE TIME OF HIS ARREST WERE ADMISSIBLE.

At the time of his arrest appellant was interrogated (Tr. 89). He was asked whether he had a business or occupation, and he answered that he had been unemployed for the past year (Tr. 92). He was also asked how he could explain buying a house and paying cash for a Cadillac when he was not working. His only answer was that his income was derived from gambling. When accused of engaging in a narcotic transaction with Rocky Yep appellant made no answer (Tr. 92). It is this testimony which is the subject of appellant's arguments under point 5 of his brief, at page 58. It has long been held that when a defendant does not deny accusations, under circumstances that an innocent man would make some statement, that failure is admissible in evidence against him.

Gentili v. United States, (9th Cir.) 22 F.2d 67, 1927;

Rocchia v. United States, (9th Cir.) 78 F.2d 966, 1935.

Here, however, the agents' questions and appellant's answers were part of an integrated series of questions. The court was entitled to know all that transpired at the time of appellant's arrest. The government admits that mere silence in the face of an accusation is slight, if any, evidence of guilt. Here, however, appellant on the stand stated first that he was silent to protect Yep (Tr. 178) and then on cross-examination, that

he had remained silent in order to protect himself (Tr. 189). It is the evidence on the stand which the government argues is evidence of guilty knowledge. The evidence, at the time of appellant's arrest, is merely a portion of an interview which developed the very significant circumstances that appellant, although unemployed for the past year, could afford expensive Cadillacs and houses. This expenditure, in the absence of any reasonable explanation, tended to show (in conjunction with appellant's activities with Yep) an individual who was engaged in the narcotic traffic.

Appellant relies on the case of *Poole v. United States,* (9th Cir.) 97 F.2d 423, 1938. In that case the defendant had *denied* his guilt when accused. His co-defendant had stated at the time in question that the defendant was the person from whom she received the narcotics. This court held that the admission of her statement, even though coupled with his denial, was merely the admission of prejudicial hearsay, since the co-defendant had not testified at the trial. The situation in the *Poole* case is a far cry from the situation we have here. In this case the defendant made no denial after the accusation, and no prejudicial hearsay was admitted by indirect means as was the case in *Poole v. United States,* supra.

CONCLUSION.

In the instant case the question before Judge Roche was one of credibility. Appellant admitted being with defendant Yep during the progress of the narcotic transaction. The evidence showed that Ong was the only person from whom Yep could have secured the narcotics. He contradicted the evidence in significant parts of his testimony. The court was not required to believe the testimony of a felon previously convicted of a violation of the narcotic laws.

The judgment below should be affirmed.

Dated, San Francisco, California,
December 28, 1956.

LLOYD H. BURKE,
United States Attorney,
DONALD B. CONSTINE,
Assistant United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.